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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 202.

EUTERPE ECONOMOS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIOARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Euterpe Economos, by her attorney, Thomas M. Wilkins, Union Trust Building, Washington (5), D. C., respectfuly moves that this Honorable Court grant leave to the petitioner herein to file the attached petition for rehearing and motion to vacate, *nunc pro tunc,* the order of October 11, 1948, denying petition for writ of certiorari.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

The order of this Honorable Court denying petition for writ of certiorari in this proceeding was entered on October 11, 1948.

CIRCUMSTANCES ADVANCED AS GROUNDS FOR THIS MOTION.

At the time of the entry of the order denying petition for writ of certiorari herein there existed a conflict between the decision of the Court of Appeals for the Fourth Circuit in the proceeding herein, *Economos* v. *Commissioner,* 167 F. 2d 165, and the decision of the Court of Appeals for the Fifth Circuit in *W. O. Culbertson* v. *Commissioner of Internal Revenue,* 168 F. 2d 979. This ground for rehearing on order denying petition for writ of certiorari is advanced as constituting a substantial ground available to Petitioner although not previously presented.

Petitioner's counsel in the proceeding (No. 202) did not learn of the said conflict until after this Court had granted certiorari in the *Culbertson case.*

Subsequent to the said denial of petition for certiorari in the within proceeding; namely, on December 6, 1948, this Honorable Court granted a petition for writ of certiorari in the case of *Commissioner of Internal Revenue* v. *W. O. Culbertson, No. 313,* to review the decision of the Court of Appeals for the Fifth Circuit in *Culbertson* v. *Commissioner, supra,* which decision is in conflict with the decision of the Court of Appeals for the Fourth Circuit in the proceeding below, *Economos* v. *Commissioner, supra.* This ground is advanced as an intervening circumstance of substantial or controlling effect, occurring after denial of certiorari.

Respectfully submitted,

THOMAS M. WILKINS,
Counsel for Petitioner.

December 21, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 202.

EUTERPE ECONOMOS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND MOTION TO VACATE NUNC PRO TUNC THE ORDER DENYING PETITION FOR WRIT.

Petitioner, Euterpe Economos, by her attorney, Thomas M. Wilkins, Union Trust Building, Washington (5), D. C., respectfully petitions this Honorable Court for a rehearing on the order of October 11, 1948, denying petition for certiorari in this proceeding and respectfully moves that this Honorable Court enlarge the time for filing petition for rehearing herein to include the time for filing and acting on this motion and petition and that the Court vacate, *nunc pro tunc,* its said order of October 11, 1948, denying said petition.

ARGUMENT.

Conflict Between Circuits.

The Court of Appeals for the Fifth Circuit in its decision in *Culbertson* v. *Commissioner, supra,* on the evidence, reversed the finding of the Tax Court that there was no valid partnership as to certain alleged partners who had contributed neither capital nor services and squarely rejected the supposed legal concept attributed to this Court in the cases of *Commissioner* v. *Tower,* 327 U. S. 280 and *Lusthaus* v. *Commissioner,* 327 U. S. 293:

> ". . . that no partnership is valid—income-tax-wise—between members of a family unless the members of the family coming into the partnership actually contribute money or had actually, theretofore rendered services." (168 F. 2d at p. 983.)

This very concept of the law of partnerships for income tax purposes, quoted immediately above, which was rejected by the Court of Appeals for the Fifth Circuit in the *Culbertson case, supra,* was applied by the Tax Court in the proceeding below, where the Tax Court had rejected the petitioner's contention that the income should be taxed to the *owners of the partnership interests,* irrespective of whether they contributed capital or services to the business.

The Court of Appeals for the Fourth Circuit, in the proceeding below, in affirming the Tax Court, refused, as a matter of law, to tax the partnership income to the owners of the partnership interest, saying:

> ". . . that the arrangement cannot be given this effect under the rulings of the Supreme Court and of the Court of Appeals of this and other Circuits . . ." Citing the *Tower* and *Lusthaus* decisions of this court. (167 F. 2d at p. 167.)

By this language, the Court of Appeals below clearly followed the concept of the law of partnerships for income tax purposes, which was specifically rejected by the Court

of Appeals for the Fifth Circuit in the *Culbertson case, supra,* in taxing the income of the business "to him who owns it" (p. 984 of 168 F. 2d), irrespective of whether such owners of the income contributed capital or services to such business.

In the petition for writ of certiorari which was granted in the *Culbertson case, supra,* the Solicitor General in his third reason for granting the writ, stated:

> "The decision of the court below not only is in conflict with this court's decision in the *Tower* and *Lusthaus* cases, but reflects a marked departure from the approach taken by other Courts of Appeals and the Fifth Circuit itself in the direct wake of and even prior to this court's *Tower* and *Lusthaus* decisions." (Page 15)

In Note No. 9 (Pages 15 and 16) referring to the above quotation, in the Solicitor General's petition for the writ, as evidence of the conflict referred to in the said quotation, there appear thirty-eight cited cases including the case of *Economos* v. *Commissioner,* 167 F. 2d 165, which is the decision of the Court of Appeals for the Fourth Circuit below in the proceeding herein.

Jurisdiction.

In the petition for certiorari, among other grounds for granting the writ, petitioner contended that the decision of the court below was in conflict with that of the Court of Appeals for the Tenth Circuit in *Armstrong* v. *Commissioner,* 143 F. 2d 700 (Petition, p. 9).

The Solicitor General in his brief in opposition (filed in September, 1948) stated that there was no merit to the taxpayer's argument as to this claimed conflict (Respondent's Brief, p. 9).

On September 27, 1948, however, the Solicitor General filed petition for certiorari in the case of *Commissioner* v. *W. O. Culbertson, No. 313,* giving on page 15 as a reason for granting the writ, the conflict between the decision in *W. O. Culbertson* v. *Commissioner,* 168 F. 2d 165, in the

Fourth Circuit. This reference was obscured in a long note in small type on two pages, containing thirty-eight cited cases, of which thirty-six were not before this court at the time.

Petitioner's counsel did not learn of this recognized conflict with the *Culbertson case* until about December 13, 1948, which was after the expiration of the usual fifteen days allowed by the rules of this Court for the filing of a petition for rehearing in this proceeding (No. 202).

Therefore, on October 11, 1948, at the time that this Court considered and denied petition for certiorari in this proceeding, this Court had before it in an obscure and latent manner, the information that the decision of the Court of Appeals for the Fourth Circuit in the *Economos case*, below, was in conflict with the decision of the Court of Appeals for the Fifth Circuit in the *Culbertson case*, and that certiorari had been requested by the Solicitor General in the latter case, among other grounds, *on the ground of that very conflict*. The attention of this Court was not called to this conflict by the petitioner herein until now.

This case is unlike the case of *R. Simpson & Company* v. *Commissioner of Internal Revenue*, 321 U. S. 225, 64 Sup. Ct. 496, 88 L. Ed. 688, where this court dismissed a proceeding on which it had first denied certiorari and later granted certiorari on a petition for rehearing made out of time, three Justices dissenting.

In the case of *R. Simpson & Company*, the conflict upon which this Court relied to grant the petition for certiorari *did not exist at the time certiorari was denied and did not arise at any time during the twenty-five day period then allowed by Rule 33 for the filing of a petition for rehearing.* The conflict in that case arose in February, 1943. This Court had correctly denied certiorari on November 9, 1942 because there appeared to be no conflict, and the twenty-five day period allowed by the then Rule of the Court in which to file petition for rehearing, as of right, had expired during December, 1942.

Under these circumstances, therefore, it is clear that this court was correct in denying certiorari in the *R. Simpson & Company case* because of the lack of conflict and that no conflict had arisen until after the time for the filing, as of right, of the petition for rehearing had expired.

In the instant case, on the contrary, at the time this Court denied certiorari, it had before it the information of the existence of a conflict with the decision in this proceeding and a decision of different Circuit, which conflict had been brought to its attention obscurely in a petition for certiorari filed in the conflicting case by the Respondent in the proceeding in the instant case.

It is familiar law, that, at common law, a court has full control over its orders or judgments during the term at which they are made and may, on sufficient cause shown, amend, correct, open or *vacate* such judgments. *This power is inherent and exists independently of any statute. Judgments*, 49 C. J. S. 436, etc. In *Bronson* v. *Schulten*, 104 U. S. 410, 415, this Court stated the Rule as follows:

> "It is a general rule of the law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the Term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that Court."

In *Bassett* v. *United States*, 9 Wallace 38, 41, in which the action of a court in setting aside a judgment at the same term at which it was rendered was sustained, this Court said:

> "This control of the court over its own judgment during the term is of every day practice."

In *Henderson* v. *Carbondale Coal & Coke Company*, 140 U. S. 25, 40, 11 Sup. Ct. 691, 696, this Court said:

> ". . . where a judgment or decree is set aside at the term at which it is rendered *it is as though it had never been.*" (Italics ours).

Neither this latter case nor the principle of the *nunc pro tunc* effect of vacating orders was mentioned in the opinion of the court or the dissenting opinion in the case of *R. Simpson & Company, supra.*

When Congress enacted the provisions of Sec. 1140, which provide that the decision of the Tax Court shall become final "upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed. . .", it must have had in mind this well-recognized rule under which the Supreme Court of the United States has inherent power to vacate its orders rendered during the term denying petition for writ of certiorari and that the court's judgment or decree in vacating such denial of certiorari is as though the denial "had never been." If Congress, by the enactment of Sec. 1140, had intended to curtail the inherent power of the Supreme Court to modify or set aside its denial of certiorari during the term, it certainly would have said so in clear language, but having said nothing in this regard, it must be assumed that when the Supreme Court reconsiders its denial of certiorari on the basis of circumstances, which were in existence at the time of denial, which required that the petition be granted, it must be assumed in such circumstances that Congress intended that the Supreme Court could exercise its inherent power to make the correction during the term by vacating its order denying certiorari, and that the original erroneous denial of certiorari would be "*as though it had never been.*" *Henderson* v. *Carbondale Coal & Coke Company, supra.*

In the case of *R. Simpson & Company, supra*, this Court's Rule 33 with respect to rehearing included no separate and specific reference to rehearings of orders on petitions for writs of certiorari.

On October 14, 1947, however, this Court modified its Rule 33 with respect to rehearing, adding a new provision, effective January 1, 1948, specifically relating to rehearing "Of orders on petitions for writs of certiorari," reading as follows:

"2. Of orders on petitions for writs of certiorari. A petition for rehearing may be filed with the clerk in term time or in vacation, subject to the requirements respecting time, service, printing and number of copies furnished as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e.g., *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 34, footnote 1; *Massey v. United States*, 291 U. S. 608), or to other substantial grounds available to petitioner although not previously presented (e.g., *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

"(a) A response, if printed and forty copies thereof furnished, accompanied by proof of service, may be filed with the clerk within ten days after service of petition, unless the time is shortened or enlarged by the court or a Justice thereof."

It is not unlikely that this new "intervening circumstances" phrase may have been inserted under this Court's inherent power, during term, to vacate orders denying petitions for certiorari so as to do justice should circumstances similar to those involved in the *R. Simpson & Company case* arise in the future.

This Court's inherent power to vacate its orders during the term is consistent with the present procedural rule of determination recently outlined by Congress, and effective September 1, 1948, by Sec. 2106 of Title 28 U. S. C. That section reads as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judg-

ment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (Act of Congress, approved June 25, 1948.)" (Italics ours.)

While it might be said that, under old Rule 33, the order which was vacated in *R. Simpson & Company, supra*, was not "lawfully brought before it for review", (within the meaning of Sec. 2106), because the old Rule did not provide specifically for reviewing *orders on petitions for writs of certiorari*, this criticism cannot be made with respect to a petition for rehearing on petition for writ of certiorari brought out of time but within the circumstances outlined in the present Rule and within the time as enlarged by the Court or a justice thereof.

Sec. 1141 (c)(2) of Title 26 U. S. C. specifically empowers the courts, including the Supreme Court of the United States, in the review of Tax Court cases, "to adopt rules for the filing of the petition for review, the preparation of the record for review, *and the conduct of the proceedings upon such review.*" (Italics supplied) This provision certainly authorizes this court to promulgate its present Rule No. 33 and, unless the denial of a petition for certiorari is so final under Sec. 1140 (b)(2) as to nullify even the fifteen day rule for filing petition for rehearing, the provision in Rule 33 for the enlargement of that time is effective, with an order vacating the order denying a petition for certiorari, to nullify the previous denial of certiorari *"as though it had never been"*. *Henderson* v. *Carbondale Coal & Coke Company, supra.*

If the denial "had never been", the Tax Court's decision never became final and is a nullity. But the Revenue laws are so framed that no one can be hurt by the *nunc pro tunc* effect of any vacating order, as will be shown below.

The statute of limitations for the assessment and collection of federal income taxes is suspended by the provisions of Sec. 277 of Title 26 U. S. C. for the period during which the Commissioner is prohibited from making the assess-

ment or beginning a distraint or a proceeding in court *until the decision of the Tax Court becomes final, and for sixty days thereafter,* and the Tax Court's affirmed decision becomes final upon denial of certiorari, under Sec. 1140 (b)(2), Title 26 U. S. C.

It is impossible to see how any rights could be prejudiced by the vacating of an order denying petition for certiorari, when the vacating order would have the effect of nullifying such previous order denying the writ, because "it would be as though it had never been." On the basis of the subsequent order vacating the denial, *the suspension of the statute would remain in effect as though no denial had occurred.*

The discussion in the majority opinion of this Court in *R. Simpson & Company, supra,* deals with the finality of Tax Court decisions in relation to the statute of limitations. It goes into that part of the legislative history covering the finality provision without covering that part dealing with the effect of the suspension of the statute of limitations during the period during which for any reason at all, the Commissioner was prevented from assessing or collecting the tax. (See Report of Ways and Means Committee, 70th Cong., 1st Sess., H. Rept. 2, pages 23 and 24.)

Section 277 of the Revenue Act of 1928 (Act of May 29, 1928, C. 852, 45 Stat. 791-883, Title 26 U. S. C. Revenue acts of 1924 to date 1940 ed. p. 431) now Section 277 of Title 26 U. S. C., was changed to provide for the suspension of the statute in cases where "the paper filed (as a petition with the Board) within the period was not sufficient to constitute a petition." At the same time it was further suggested to the Committee on Ways and Means that language also be inserted to show that the running of the statute should be suspended not only when the Commissioner is under the prohibitions of Section 272 (a), now Section 272 (a) of Title 26 U. S. C., but also when the Commissioner is restricted by order of court from making assessment or collection.

The Committee refused to make any other change in the statute, because it felt that the language of the statute was perfectly definite on this point and that no clarification was necessary. It stated that the language "clearly indicated that the intention was to suspend the running of the statute for the period during which, *for any reason at all*, the Commissioner's hands were tied." (H. Rept. 2, *supra.*) (Italics ours)

The meticulous formula for the suspension of the statute in Tax Court cases, clearly evinces the most careful intention on the part of Congress to protect the rights of both parties until after the litigation has come to an irrevocable termination.

Consider the following possibilities:

(a) Where the vacated order incorrectly determined a deficiency of only $1,000 and the eventual final order correctly determines a deficiency of $2,000, the prohibition against any assessment or collection would have existed until the incorrect order for a $1,000 deficiency became "final." From then on there would continue a prohibition against the assessment or collection of any sum *in excess of $1,000*, suspending the statute as to such excess.

(b) Where the vacated order incorrectly determined a deficiency of $2,000 and the eventual final order correctly determines a deficiency of only $1,000 vacating the first "final order", the Commissioner might assess and collect the entire $2,000 before the entry of the vacating order, in which case the parties would be in the same position upon entry of the original order and until it was vacated, as if the taxpayer had given a waiver of the Commissioner's restrictions against assessment and collection under Section 272 (d) of Title 26 U. S. C. and eventually, the excessive $1,000 would be refundable through Tax Court order or even suit, under Section 322 (c)(2) of Title 26 U. S. C. as an "amount collected in excess of an amount computed in accordance with the" Tax Court's decision, which has become final.

If the Commissioner did not have time, after the original erroneous final order was entered, to assess and collect the $1,000 under circumstances in (a) or the $2,000 under circumstances in (b), before the vacating order was entered, the prohibition against assessment and collection would be reinstated *nunc pro tunc* by the vacating order but the *suspension* of the statute would remain unbroken any way.

Whether the vacated order is regarded "as if it had never been" or as if it possessed enduring effect although vacated, the statute would have been *suspended* under either view, while the order was in effect, because the statute is suspended under Section 277 of Title 26 U. S. C. until the decision of the Tax Court becomes final "*and for sixty days thereafter*". In practice the Commissioner assesses and collects the deficiency during the sixty day period.

Therefore it cannot be argued consistently that: (1) There was no suspension under the sixty day clause because the vacating order made that suspension "as though it had never been" and (2) because, *except retrospectively*, there was no prohibition against assessment and collection between the time of the entry of the later vacated order and the time of the entry of the order vacating it, and that therefore there was no suspension of the statute during that intervening period.

Under one view or the other there must have been an unbroken continuation of the suspension of the statute during the entire period and until the litigation has come to a termination not later revoked.

Specifically in the instant case, no bond was filed and the deficiency was assessed and collected while the proceeding was pending in the Court of Appeals. Assuming that the order denying the writ is vacated *nunc pro tunc* and the decision of the Tax Court is reversed, and permitted to become final, the amount already paid would be refundable under Sec. 322 (c)(2) as an "amount collected in excess of an amount computed in accordance with the decision of the Board which has become final. . ."

In enacting Sec. 1140 (b)(2) of Title 26, U. S. C., Congress certainly must have been conscious of the *nunc pro tunc* effect of an order vacating an order denying a petition for certiorari. It must have regarded the provisions of said Sec. 277 and Sec. 322 (c)(2) of Title 26, U. S. C. as sufficient to protect the rights of either party in such cases, otherwise it would have inserted some provision similar to the amendment of Sec. 277 first contained in Sec. 277 of the Revenue Act of 1928 (Act of May 29, 1928, C. 852, 45 Stat. 791-883), to regard a wholly defective paper "placed on the docket of the Board" as sufficient to suspend the statute of limitations for assessment and collection of the tax. See Report of Committee on Ways and Means, 70th Cong., 1st Sess., H. Report 2, pp. 23-24. See also Seidman's Legislative History of Federal Income Tax Laws (1938 Edition) pp. 551, 552.

CONCLUSION.

In view of the above circumstances and because of the conflict hereinabove relied upon, it is earnestly prayed that the motion for leave to file petition for rehearing be granted, that the time for filing petition for rehearing on the order on petition for certiorari in this pending be enlarged to protect this motion and petition; that the order denying petition for certiorari in this proceeding be vacated and set aside *nunc pro tunc* and that the petition for certiorari be granted.

THOMAS M. WILKINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, Thomas M. Wilkins, counsel for petitioner in the proceeding herein. do hereby certify that this motion for leave to file petition for rehearing and the petition are presented in good faith and not for delay and that the motion is restricted to intervening circumstances of substantial controlling effect and to other substantial grounds available to petitioner although not previously presented.

THOMAS M. WILKINS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 202.

EUTERPE ECONOMOS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

SUPPLEMENTAL MEMORANDUM TO MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

JURISDICTION.

This supplemental memorandum is respectfully presented to call attention to the inadvertent misstatement of the history of Section 1140, Title 26, U.S.C., which this Court adopted as part of its majority opinion in *R. Simpson & Son Inc.* v. *Commissioner*, 321 U. S. 225 at page 228, from Senate Report No. 52, 69th Congress, 1st Session, page 37, reporting on Section 1005 of the Bill, which became the Revenue Act of 1926. (Act of Feb. 26, 1926, C. 27, 44 Stat. 9-131.) Said Report No. 52 is dated January 16, 1926.

Under the Bill, in its original form, the importance of the Finality provisions of Section 1005, bore a direct relation to the statute of limitations in terms of extension in Board of Tax Appeals cases, where notice of deficiency would be mailed.

Section 277(b) of the original draft provided that the Statute of limitations for assessment and collection

> " . . . shall be extended (1) by 60 days if a notice of such deficiency has been mailed . . . and no petition has been filed . . . or, (2) if a petition has been filed, then by the number of days between the date of the mailing of such notice and the date the decision of the Board has become final." (Draft of December 7, 1925, accompanying H. Rept. 1, 69th Cong., 1st Sess. Union Calendar No. 1. See draft of Bill page 124, lines 3-14.)

The use of the language measuring a suspension by the period during which "the Commissioner is prohibited" from assessing and collecting the tax, was first introduced in a later draft. (See page 124, lines 9-15 of December 21, 1925 draft as referred to Senate Finance Committee.)

The House Ways and Means Committee Report accompanying the Bill, explained the provisions dealing with "Court Review—Finality of Decisions—", which became Section 1005 of the Revenue Act of 1926. This explanation employed language appropriately couched to fit the original draft of Section 277(b) of the Bill. However, that explanation eventually became quite inappropriate to the modified draft of the Bill as it was when it left the Senate Finance Committee with its Report No. 52, *supra*, and as it finally passed. See page 136, lines 12-25 and page 137 lines 1-7 of January 16, 1926 draft of Bill, accompanying said Sen. Rep. No. 52.)

The reasons for the enactment of the Finality provisions which were given in the House Report on the Bill had become obsolete and quite inapplicable by the time the provisions of the draft of Section 277(b) had been modified to substitute the word "suspended" for the word "extended" and to adopt as a measure of such suspension, the period during which, in so many words, the Commissioner was "prohibited" from assessing and collecting the deficiency. This suspension formula was adopted in place of an extension for so many days.

These changes and the addition in the Senate Finance Committee, of an additional sixty day period within which to assess and collect *after the Board's decision had become*

final, rendered the explanation of the finality provisions of Section 1005 as it finally passed substantially erroneous. In fact it was erroneous when Senate Report No. 52, 69th Cong., 1st Sess., pp. 37-38, was issued.

Inasmuch as there had been no *direct change* in the Finality provisions *themselves,* in the matter of suspension, the said Report No. 52 at pages 37 and 38, apparently overlooked the *indirect changes* brought about in the reasons originally given by the Ways and Means Committee for the enactment of the Finality provisions. This may explain why the Senate Committee erroneously adopted, almost word for word, the House Report on the Finality provisions. (H. Rept. 1, 69th Cong., 1st Sess., pp. 20-21.)

Specifically, the Senate Finance Committee Report stated, quite erroneously, that the "statute of limitations upon assessments and suits for collection, . . . commences to run upon the day upon which the Board's decision becomes final . . . "

Furthermore, on February 5, 1926, Section 277(b) was further amended (by an amendment on the Senate Floor) adding the phrase "and for 60 days thereafter", striking the more cumbersome language to the same effect. (Vol. 67, Cong. Rec., p. 3378.)

As the 1926 Revenue Act was finally passed, the statute of limitations does not commence to run "upon the day upon which the Board's decision becomes final." It does not commence to run until sixty days thereafter.

This erroneous report is the report which this Court quoted in its majority opinion as containing the historical reason for the Finality provision which is now Section 1140 of Title 26 U.S.C.

The importance of "finality" *in relation to suspension* in the modified draft had disappeared, as the result of the changed Section 277(b), which then and now measures the suspension by the period during which, in so many words, the Commissioner is "prohibited" from making the assessment or collection.

Inasmuch as the suspension *is intended to apply if for any reason at all the Commissioner's hands are tied,* (House Ways and Means Committee Report No. 2, 70th Cong., 1st Sess., pp. 23-24, also House Ways and Means Committee Report 356, 69th Cong., 1st Sess., p. 42) in the matter of assessment or collection, the date of finality can have importance only to permit the Commissioner to assess and collect the deficiency determined, which has become final.

It is now important for the Commissioner to know exactly when the decision becomes final, only because Section 272(a) of Title 26 U.S.C. prohibits assessment in Tax Court cases until the decision becomes final. As the Commissioner's hands are then no longer "tied", he does not have to postpone assessment and collection perhaps nearly a year, until the end of the term of court to determine whether or not, for any reason, the court might vacate or set aside an order determining a deficiency which has become final.

For the purposes of orderly administration, in the usual case, Section 1140 (b) and 1140 (c), the Commissioner's hands are tied for an additional 30 days, in court review cases, to permit time for the institution of proceedings to have the decision corrected. After that, for administrative purposes, the Commissioner may then assess and collect the deficiency determined. If, thereafter, but during the term, the decision is later vacated, the "final" order which untied the Commissioner's hands, might be vacated and any amount which had been collected in excess of the deficiency later finally determined, may be refunded under Section 322 (c) (2) of Title 26, U. S. C. See discussion on pages 11, 12 and 13 of Motion to Leave to File Petition for Rehearing.

Respectfully submitted,

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